No. 12316

In the United States Court of Appeals for the Ninth Circuit

LELA WILCOX, APPELLANT

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

BRIEF FOR APPELLEE

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JURISDICTION

This is an appeal from a judgment of restitution for rent overcharges and an injunction restraining violations of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, et seq.), entered by the Court below on April 8, 1949 (R. 46). The judgment of restitution was based upon Section 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.), and Section 206 (b) of the Housing and Rent Act of 1947 and the injunction was granted pursuant to Section 206 (b) of the Housing and Rent Act of 1947. Jurisdiction of this Court is invoked pursuant to Section 1291 of the Judiciary and Judicial Code (28 U. S. C. A. 1291).

FACTS

The principal question presented in this appeal is whether the Court below erred in finding as a fact that the premises of which appellant was the landlord was rented on a daily basis or on a weekly basis (Tr. 3–4). The tenants testified that they rented the premises on a weekly basis (Tr. 8, 18, 24, 31, 34). The defendant relied upon written receipts showing that the premises were rented on a daily basis, and denied renting on a weekly basis. On the stand defendant was unable to state whether, in renting the premises to the tenant Page, she quoted a daily rate or a weekly rate (Tr. 39–40). At the conclusion of the hearing the Court made findings of fact and conclusions of law in which, among other findings, he stated that the defendant collected amounts, in excess of the legal maximum weekly rent (Findings 8, 9, 11, 12, 13, 14, 15, R. 39–41). The Court thereupon concluded that restitution should be made in the amount of the overcharges so found and an injunction should issue (Conclusions 2, 3, 5a–d, R. 42–44). From that judgment the landlord appeals (R. 59).

ARGUMENT

I

The District Court's finding that the premises herein were rented on a weekly basis is supported by substantial evidence. In any event the finding is not so clearly erroneous that it should be set aside

As stated above, the principal question before the Court was whether the premises herein were rented on a weekly or a daily basis (Tr. 3–4). The tenant Page

testified unequivocally that she rented the premises on a weekly basis. In this connection she testified:

> The WITNESS. We asked to see the room; we saw the room we said, "What is the rental?"
>
> The COURT. Who is "we"?
>
> The WITNESS. My husband and myself.
>
> The COURT. Which one of you talked to her?
>
> The WITNESS. We both did. We said, "What is the rental?" and she said "$10.50 a week." We came to the house through a real estate agent, and he charged ——
>
> The COURT. Never mind about what he charged.
>
> The WITNESS. There was no mention of a daily rate.
>
> The COURT. Mrs. Wilcox said ten dollars and a half a week?
>
> The WITNESS. Yes. There was never any mention to me of a daily rate, never.
>
> The COURT. Nothing was said about it?
>
> The WITNESS. Nothing whatsoever (Tr. 7–8).

The tenant Hall testified as follows:

> Q. Was anything at all said about the daily rate at the time that you rented this room for Miss Lensky?
>
> A. I can't recall any daily rate, because we paid always by the week.
>
> The COURT. No. Was anything said about it?
>
> The WITNESS. No, sir.
>
> The COURT. Nothing was said about so much a day?
>
> The WITNESS. No, nothing at all. I paid weekly for both my daughters and myself (Tr. 18–19).

The tenant Lensky testified in a similar vein:

> A. Yes, Mrs. Wilcox wanted to know whether I was going to stay or going to move, and I told her I would like to stay. Mrs. Wilcox informed me that the rent would be $10 a week, the same as it was before.
>
> Q. At that time did you have anyone with you after Mrs. Hall left?
>
> A. No; I didn't for a period of months.
>
> Q. But nevertheless you paid how much?
>
> A. $10 a week.
>
> Q. Was there anything said to you by Mrs. Wilcox with reference to a daily rate at that time?
>
> A. No (Tr. 24).

The defendant Shore, an agent of defendant Wilcox, was called as a witness under Rule 43 (b) of the Federal Rules of Civil Procedure and testified that the premises in the rear were rented on a weekly basis to the tenant Pytlik.[1] The testimony in that connection was to the same effect as the foregoing:

> A. I was not, but the young lady called Ruth Actor said he made arrangements, he offered $10 a week himself, personally.
>
> Q. Were you there when he made that offer?
>
> A. No; I was not. But this young lady called Ruth Actor, she moved the last year, she told me that, and Miss Wilcox told me the same thing, I was there two hours afterwards, she told me Miss Wilcox had rented that room for $10, that it was his own price.
>
> The COURT. $10 a week?

[1] The judgment in favor of the tenant Pytlik was against the defendant Otto Smith (R. 47). Since no appeal has been taken from that judgment, it is not in issue before this Court.

The WITNESS. Yes.

The COURT. What did Mrs. Wilcox say?

The WITNESS. Mrs. Wilcox, she made the deal.

The COURT. Did you talk with Mrs. Wilcox and ask her if that was true?

The WITNESS. Yes, later.

The COURT. What did she say?

The WITNESS. Yes, she said he offered $10.

The COURT. And she accepted it?

The WITNESS. Yes.

The COURT. $10 a week (Tr. 34).

The defendant took the stand on direct examination and was interrogated by the Court at the outset. With regard to the foregoing testimony of Mrs. Page the defendant was unable to testify that she had ever mentioned to the Pages that the premises were to be rented at a daily rate (Tr. 38). Under direct examination by the Court, she continued to evade answering directly that she said that the premises were for rent on a daily basis:

The COURT. She doesn't recall whether she said anything to them about the dollar and a half a day, because she thought that had been told by the agent who sent them. That is your testimony?

The WITNESS. I could have done it, but I imagine I did think—because I quoted the rate to the agents.

The COURT. Then you don't recall that you told them a dollar and a half a day?

The WITNESS. But they signed this receipt I gave them, and I think that should be sufficient, they should see that.

> The COURT. Do you want to offer that in evidence?
>
> Mr. ZIMMERMAN. Yes, if she finds it, if the court please.
>
> The WITNESS. It is here.
>
> Mr. ZIMMERMAN. She showed it to me awhile ago.
>
> The WITNESS. May I look for this later?
>
> The COURT. Yes. Just go ahead. She can look it up later (Tr. 39–40).

In view of the above excerpts on the trial of this issue, it cannot be said that the judgment rendered by the Court below was not based upon substantial evidence. The judgment therefore should be affirmed (Rule 52 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A., foll. 723 (c); *Roos* v. *Woods,* No. 11938, decided December 8, 1948 (C. A. 9)).

Rule 52 (a) of the Federal Rules of Civil Procedure provides in part:

> * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

In applying the above rule this Court has repeatedly held that where a finding is not clearly erroneous it is "obliged to accept it." *Coffin-Redington Co.* v. *Porter,* 156 F. 2d 113 (C. A. 9); *Columbian National Life Insurance Co.* v. *A. Quandt & Sons,* 154 F. 2d 1006 (C. A. 9th); *Wingate* v. *Bercut,* 146 F. 2d 725 (C. A. 9th); *Goldstein* v. *Polakof,* 135 F. 2d 45 (C. A. 9th); *Cherry-Burrell Co.* v. *Thatcher,* 107 F. 2d 65 (C. A.

9th); *Lumberman's Mutual Casualty Co.* v. *McIver,* 110 F. 2d 323 (C. A. 9th).

In the *Coffin Redington* case, *supra,* this Court after viewing the entire Record sustained the finding of the trial Court that the defendants violated the Emergency Price Control Act by a tie-in sale of liquors, stating at p. 114:

> The trial court observed their conduct and demeanor while on the stand, and was in better position than we to appraise the situation and to draw inferences. We are not able to say that the finding in question was clearly erroneous and are therefore obliged to accept it. (*Columbian National Life Ins. Co.* v. *A. Quandt & Sons,* 9 Cir., 154 F. 2d 1006.

Furthermore, the conflicting nature of the testimony has been the basis upon which courts of appeals have held such evidence is "inassailable" in the court of review. (*United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 433 (C. A. 2d)). The Court in that case, speaking through Judge Learned Hand, stated the rule as follows:

> * * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated as unassailable." *Davis* v. *Shwartz,* 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson* v. *Gilliland,* 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 477, 58 S. Ct.

> 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part and often by no means the most important part, of the sense impression which we use to make up our minds. *Morris Plan Industrial Bank* v. *Henderson,* 2 Cir., 131 F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed "unassailable," except in the most exceptional cases (at p. 433).

So, too, in this case where the Court below had the opportunity to observe the witnesses, and weigh each one's statements upon the basis of all factors before it, this Court should give due weight to the findings based upon those factors.

This Court stated the rule to be as follows, in *Columbian National Life Insurance Company* v. *A. Quandt & Sons* (154 F. 2d 1006):

> Where there is a conflict in the evidence, this court must keep in mind that the trial judge who hears and sees the witnesses has a better opportunity to appraise their credibility and judge the weight to be attached to their testimony. We cannot say that the finding of the

lower court was clearly erroneous. It is the rule that the findings of the trial court are to be accepted on appeal unless clearly wrong.

The appellant in her brief relies exclusively upon the case of *United States* v. *United States Gypsum Co.,* 333 U. S. 364, in which the Court says, at p. 395, that "a finding is 'clearly erroneous' when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Court immediately prior to the quotation relied so heavily upon by appellant also stated that "* * * findings of the trial court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court."

Where the testimony was so unequivocal, as it was here, where all of the plaintiff's witnesses and one of defendant's witnesses testified to a weekly rate and defendant herself was unable to testify in one instance whether she quoted a daily rate, and where the trial Court based its findings entirely upon the oral evidence before it, this Court assuredly cannot be "left with the definite and firm conviction that a mistake has been committed" (*United States* v. *United States Gypsum Co., supra*).

Since appellant clearly recognized that she had failed to make out a case in the Court below, something more than reliance upon the dictum of the *United States Gypsum* case is necessary to overturn the findings of the Court below in the face of the substantial record in this case.

Certainly, "construing the testimony most favorably in support of this finding," as this Court is "required to do" (*Chatz* v. *Armour Plant Employee's Credit Union,* 154 F. 2d 236, 240 (C. A. 7th) it cannot be said that the Record in this case fails to support the finding of the Court below that the premises here were rented on a weekly basis.

II

The court below properly entered an order of restitution pursuant to Section 205 (a) of the Emergency Price Control Act of 1942 and Section 206 (b) of the Housing and Rent Act of 1947, as amended

In points 3 and 4 of her brief appellant erroneously assumes that the judgment in the Court below was issued pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 925 (e)). That contention, of course, is contrary to the allegations of the complaint.

The action is brought "for restitution pursuant to Section 205 (a)" of the Emergency Price Control Act of 1942 and "pursuant to Section 206" of the Housing and Rent Act of 1947 (Par. 1, of complaint). In addition, no reference whatever is made in the allegations of the complaint to a claim for statutory damages under either Section 205 (e) of the 1942 Act or under Section 205 of the 1947 Act. Moreover, the complaint prays solely for equitable relief pursuant to Section 205 (a) of the 1942 Act and Section 206 (b) of the 1947 Act. Therefore, it is unnecessary to discuss at length appellant's third and fourth grounds for error. Restitution has been held to be a proper order pur-

suant to the equitable powers of a Court when properly invoked pursuant to Section 205 (a) of the Emergency Price Control Act (*Porter* v. *Warner Holding Co.,* 328 U. S. 395). This Court has repeatedly followed the decision laid down in that case (*Woods* v. *Richman,* 174 F. 2d 614 (C. A. 9th); *Woods* v. *Gochnour,* 177 F. 2d 964 (C. A. 9th); *Woods* v. *McCord,* 175 F. 2d 919 (C. A. 9th); accord, *Ebeling* v. *Woods,* 175 F. 2d 242 (C. A. 8th); and *Woods* v. *Witzke,* 174 F. 2d 855 (C. A. 6th). The same principles have been applied to the identical language used in Section 206 (b) of the Housing and Rent Act of 1947 (see, *Gates* v. *Woods,* 169 F. 2d 440 (C. A. 4th); *Woods* v. *Wayne,* 177 F. 2d 559 (C. A. 4th); *McCoy* v. *Woods,* 177 F. 2d 355 (C. A. 4th); *Woods* v. *Bomboy,* (C. A. 3rd) No. 10,027, January 16, 1950, not yet reported; and *Smith* v. *Woods,* 178 F. 2d 467 (C. A. 5th).

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.):

> SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, et seq.):

> SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

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